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No. 07-1607

IN THE
Supreme Court of the United States

SHELL OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF TECK COMINCO METALS, LTD., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF TECK COMINCO METALS, LTD., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

This case presents the Court with the opportunity to clarify the contours of "arranger" liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *Amicus* has a substantial interest in the correct resolution of that issue because it is a defendant in ongoing litigation that seeks to hold it liable as an arranger under CERCLA. *See Pakootas v. Teck Cominco Metals, Ltd.*, No. 04-256 (E.D. Wash. filed July 21, 2004).

Teck Cominco Metals, Ltd. ("Teck Cominco") owns and operates a smelting and refining complex in Trail, British Columbia. For nearly a century after it was built, Teck Cominco discharged waste from the Trail Smelter into the Upper Columbia River. Although Teck Cominco's disposal of waste into the Upper Columbia River took place in Canada and was conducted in accordance with the laws of Canada and British Columbia the governmental entities authorized to regulate operations at the Trail Smelter the United States Environmental Protection Agency ("EPA") issued a Unilateral Administra-

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

tive Order pursuant to CERCLA that purportedly required Teck Cominco to undertake a Remedial Investigation/Feasibility Study of the portion of the Upper Columbia River located in the United States. Teck Cominco and the EPA later reached a settlement that resulted in withdrawal of that Order. Before that settlement was reached, however, two private plaintiffs brought a CERCLA citizen suit against Teck Cominco alleging that the company is an "arranger" within the meaning of the statute. In an interlocutory appeal, the Ninth Circuit allowed the suit to proceed, even though Teck Cominco's challenged conduct occurred in Canada and Teck Cominco did not enter into an "arrange[ment]" with any other party to dispose of waste in the Upper Columbia River. *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 858 (2008).

In this case, the Ninth Circuit endorsed a further radical expansion of the scope of arranger liability under CERCLA. In so doing, it disregarded the requirements for arranger liability established by CERCLA's statutory language. This Court, in contrast, has repeatedly emphasized the importance of adhering to CERCLA's plain language when defining the statute's scope. *See United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). That language should again guide the Court when construing CERCLA's arranger liability provision.

STATEMENT

CERCLA establishes four categories of "covered persons" potentially responsible for hazardous waste cleanup costs. 42 U.S.C. § 9607(a). In addition to

the current and former owners and operators of a contaminated facility and persons who transport hazardous waste to a contaminated facility, CERCLA imposes liability on "any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . from which there is a release." *Id.* § 9607(a)(3).

The United States alleges—and the Ninth Circuit held that Shell Oil Company ("Shell") is liable as an "arranger" under Section 107(a)(3) of CERCLA because it manufactured the chemical D-D and then delivered it by common carrier to Brown & Bryant ("B&B"), a now-insolvent company that specialized in agricultural chemical storage, sale, and application. B&B used careless procedures when transferring the D-D from the common carrier's trucks to storage tanks on its property and when subsequently removing the chemical from those tanks. Pet. App. 5a. Those substandard practices resulted in the contamination of soil and groundwater at B&B's site. *Id.* at 6a.

The EPA and California environmental authorities filed suit against Shell alleging that the company was jointly and severally liable as a CERCLA arranger for the cost of remediating B&B's facility even though Shell had not shipped D-D to B&B for the purpose of disposing of that chemical on B&B's property.

The district court concluded that Shell met the requirements for arranger liability under Section 107(a)(3), but held that Shell was liable for only 6% of the cleanup costs at the B&B facility because there was a reasonable basis for apportioning Shell's responsibility with the responsibility that B&B and

other parties bore for the site's contamination. Pet. App. 8a.

The Ninth Circuit affirmed the district court's conclusion that Shell was liable as an arranger under CERCLA. Although the plain language of Section 107(a)(3) is restricted to parties who "arranged for *disposal* . . . of hazardous substances," the court of appeals held that "an entity can be an arranger even if it did not intend to dispose of the product" because a "'disposal' need not be purposeful." Pet. App. 44a. According to the Ninth Circuit, the release of D-D was "a foreseeable byproduct of" Shell's sale of that chemical to B&B, and Shell had therefore "arranged" with B&B for the chemical's disposal. *Id.* at 42a. The court of appeals further concluded that Shell was jointly and severally liable for *all* of the cleanup costs at the site because the court professed an inability to identify a reasonable basis for apportioning Shell's responsibility for those costs. *Id.* at 50a.

SUMMARY OF ARGUMENT

This Court has repeatedly emphasized that the scope of CERCLA, in general and of the causes of action that arise under Section 107(a), in particular—must be construed in accordance with the plain statutory language. *See United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

The plain language of Section 107(a)(3) establishes four elements to arranger liability. A person can only be held liable as an arranger where (1) it enters into a "contract," "agreement," or "other[ ]" similar transaction; (2) the purpose of the contract or agreement is to "arrange[ ] for disposal . . . of haz-

ardous substances owned or possessed by such person"; (3) the disposal is to be conducted "by any other party . . . at any facility . . . owned or operated by another party"; and (4) "a release . . . of a hazardous substance" occurs at that facility.

The Ninth Circuit disregarded these statutorily imposed requirements when it held Shell liable as an arranger. Indeed, it is undisputed that Shell did not sell D-D to B&B for the purpose of having B&B dispose of the chemical. The sale was instead a routine commercial transaction in which Shell sold a useful but potentially hazardous—product to B&B with the intention that B&B put the product to its normal commercial use. Shell therefore did not "arrange[ ]" with Shell "for disposal . . . of hazardous substances." Upholding the Ninth Circuit's contrary construction of CERCLA's arranger liability provision would do violence to the statutory language and undermine the congressional objectives that animate the statute.

ARGUMENT

I. ARRANGER LIABILITY IS RESTRICTED TO PERSONS WHO ENTER INTO ARRANGEMENTS WITH THIRD PARTIES FOR THE PURPOSE OF DISPOSING OF HAZARDOUS WASTE.

A. The interpretation of CERCLA depends "first and foremost" on the statute's text. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). The text of Section 107(a)(3) imposes four statutory prerequisites to the imposition of arranger liability.

Section 107(a)(3) provides that

> any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . from which there is a release . . . of a hazardous substance, shall be liable for [response costs].

42 U.S.C. § 9607(a)(3). Thus, under the plain language of Section 107(a)(3), arranger liability can be imposed only where:

(1) A person enters into a "contract," "agreement," or "other[ ]" similar transaction

(2) with the purpose of "arrang[ing] for disposal . . . of hazardous substances owned or possessed by such person"

(3) "by any other party . . . at any facility . . . owned or operated by another party" and

(4) "a release . . . of a hazardous substance" occurs at that facility.

Each of these statutory requirements is discussed in turn.

1. *A person enters into a "contract," "agreement," or "other[ ]" similar transaction*

Not surprisingly, the first statutory prerequisite to arranger liability is an arrangement: a "contract," "agreement," or "other[ ]" similar transaction. Although Section 107(a)(3) does not specify all of the ways in which the requisite arrangement can be reached, the arrangement must bear substantial similarity to the specific examples—a contract or agreement—set forth in the statute. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404

(2008) ("when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows").

At a minimum—and as borne out by other language in Section 107(a)(3) discussed below (*see infra* pg. 9) any such arrangement must involve at least two parties: the party "arrang[ing] for disposal" of hazardous waste and the party with whom that arrangement is reached. Indeed, a party cannot enter into a "contract" or "agreement" with itself, and any "other[ ]" transaction that gives rise to arranger liability under Section 107(a)(3) thus must similarly encompass multiple parties.

This reading of Section 107(a)(3) is consistent with Congress's use of the terms "arrange" and "arrangement" in other sections of CERCLA, which uniformly uses those terms to refer to transactions that involve more than one party. Section 104(a), for example, authorizes the President "to act, consistent with the national contingency plan, *to remove* or *arrange for the removal* of" hazardous waste. 42 U.S.C. § 9604(a)(1) (emphases added). That section therefore authorizes the President both to remove hazardous waste himself and to arrange for another person to do so. Similar uses of the terms "arrange" and "arrangement" appear throughout CERCLA, and confirm that arranger liability requires an agreement between multiple parties. *See, e.g., id.* § 9620(d)(2)(B) ("It shall be an appropriate factor to be taken into consideration . . . that the head of the department, agency, or instrumentality that owns or operates a facility has *arranged* with the Adminis-

trator or appropriate State authorities to respond appropriately . . . to a release") (emphasis added).[2]

2. with the purpose of "arrang[ing] for disposal . . . of hazardous substances owned or possessed by such person"

Section 107(a)(3) also requires that the defendant have entered into the contract, agreement, or other transaction with the purpose of "arrang[ing] for disposal . . . of hazardous substances owned or possessed by such person."

This intent requirement is expressly imposed by the statutory phrase "arranged for"—which denotes a purposeful activity. *See Webster's New Universal Unabridged Dictionary* 116 (1996) (defining "arrange" as "to prepare or plan" or "to come to an agreement or understanding"); *see also Webster's New International Dictionary of the English Language* 152 (2d ed. 1939) ("to settle by prior agreement or plan"). One can hardly "prepare or plan" "for the disposal" of hazardous waste without intending to dispose of that waste. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (Posner, J.) ("The words ['arranged for'] imply intentional action").

[2] *See also* 42 U.S.C. § 9627(c) ("Transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber (other than whole tires) shall be deemed to be *arranging* for recycling if the person who *arranged* for the transaction (by selling recyclable material or otherwise *arranging* for the recycling of recyclable material) can demonstrate . . . .") (emphases added); *id.* § 9661(d) ("The Administrator shall enter into a cooperative agreement with an appropriate public agency or authority of the State of New York under which the Administrator shall maintain or *arrange* for the maintenance of all properties within the Emergency Declaration Area") (emphasis added).

Section 107(a)(3) therefore does not reach parties who arrange for the sale of a useful—though potentially hazardous product to another party, unless the *purpose* of the transaction was to "deposit," "dump[ ]," or "spill[ ]" hazardous waste. *See* 42 U.S.C. § 6903(3) ("The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water"); *id.* § 9601(29). In most commercial transactions, of course, a party who sells a useful product intends to make a profit by charging more for that product than it cost to manufacture or purchase not to *dispose* of that product within the meaning of CERCLA. The fact that the inadvertent "spilling" or "leaking" of the useful product may have been a foreseeable result of the commercial transaction does not mean that the transaction constituted an "*arrange[ment] for* disposal" of hazardous waste.

3. "by any other party . . . at any facility . . . owned or operated by another party"

The third statutory prerequisite to arranger liability is that the arrangement provide for disposal or treatment of the defendant's hazardous waste "by any other party." Section 107(a)(3)'s "by any other party" language unambiguously requires that a defendant arrange with a third party for the disposal of the defendant's hazardous waste. Where a party disposes of its own waste, it manifestly has not arranged for disposal of that waste by some "*other* party."

As discussed above, this conclusion is confirmed by Congress's use of the terms "contract" or "agreement" in Section 107(a)(3) two terms that unambiguously require the involvement of more than one party—as well as by the definition of "arrange,"

which contemplates "an agreement or understanding" among multiple parties. *Webster's New Universal Unabridged Dictionary*, *supra*, at 116; *see also supra* pg. 7.

CERCLA's legislative history confirms that arranger liability can attach only where a party arranges with another person for the disposal of that party's waste. As originally introduced, the Senate precursor to CERCLA "extended liability to 'any person who caused or contributed to a release of hazardous substances.'" *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n.8 (1989). A Senate Committee "later changed this language to the 'any person who by contract, agreement or otherwise arranged for' language which was retained in the bill as reported out" and eventually "incorporated into the [final version of CERCLA] itself." *Id.* The Senate therefore considered—and rejected a formulation of Section 107(a)(3) that would have encompassed anyone who "caused . . . a release of hazardous substances" in favor of a narrower formulation that reaches only those persons who "arrange[ ] for disposal or treatment . . . of hazardous substances . . . by any other party." While the original formulation of Section 107(a)(3) may have been broad enough to reach persons who dispose of hazardous waste without the involvement of a third party, the language that Congress ultimately enacted requires an arrangement for disposal of the defendant's waste by some "*other* party."[3]

[3] In *Pakootas*, the Ninth Circuit rejected the argument that arranger liability requires the involvement of a third party. The Ninth Circuit candidly acknowledged that, in order to reach that conclusion, it was necessary to rewrite the plain language of Section 107(a)(3) by "reading the word 'or' into the

4. "a release . . . of a hazardous substance" occurs at that facility.

The final element of arranger liability under CERCLA is a release of the hazardous substance for which disposal was arranged at the facility where that disposal took place.

Like Sections 107(a)(1) and 107(a)(2) of CERCLA, Section 107(a)(3) is a sentence fragment. The courts of appeals have uniformly recognized that, to make sense of these provisions, they must be read in conjunction with the last clause of Section

[Footnote continued from previous page]

provision, so that the relevant language would read 'any person who . . . arranged for disposal or treatment . . . of hazardous substances *owned* or possessed *by such person [or] by any other party*.'" 452 F.3d at 1080 (emphases and alterations in original). The Ninth Circuit's judicial redrafting of Section 107(a)(3) not only disregards fundamental canons of statutory construction but is also directly at odds with the First Circuit's textually grounded interpretation of Section 107(a)(3). *See Am. Cyanamid v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) ("The clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity"). Moreover, the Ninth Circuit was wrong to suggest that its unilateral expansion of arranger liability was necessary to prevent a generator of waste who "disposed of the waste on the property of another"—the so-called "midnight dumper"—from escaping liability. *Pakootas*, 452 F.3d at 1081. A generator who disposes of waste on another person's property may be held liable as an "operator" of that "facility" under Section 107(a)(2). *See, e.g., Capuano*, 381 F.3d at 23; *see also United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (defining "operators" as those who "conduct operations specifically related to pollution"). Similarly, a generator who transports its own waste may be held liable as one who "accepted any hazardous substances for transport" under Section 107(a)(4). *See Pritikin v. Dep't of Energy*, 254 F.3d 791, 795 (9th Cir. 2001).

107(a)(4) "from which there is a release ... of a hazardous substance, shall be liable for." *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 n.16 (2d Cir. 1985) ("The phrase 'from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance' is incorporated in and seems to flow as if it were a part only of subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)-(3) inclusive").[4]

Accordingly, to be a covered "arranger," a defendant must "arrange[ ] for disposal ... of hazardous substances ... by any other party or entity, at any facility ... *from which there is a release.*" 42 U.S.C. § 9607(a)(3) (emphasis added). Liability will therefore attach only where the disposal and release of the hazardous substance occur at the same "facility." Section 107(a)(3) does not apply where a party arranges for disposal of its hazardous waste at one facility and the hazardous waste is thereafter released from some other facility.

B. The Ninth Circuit misapplied the plain language of Section 107(a)(3) when it held Shell liable as a CERCLA arranger.

Shell meets only three of the four elements of arranger liability. Shell did enter into a "contract" or "agreement" with a third party *i.e.*, its contract to sell D-D to B&B—and there was "a release ... of a hazardous substance" at the third party's facility.

[4] *See also Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 n.7 (8th Cir. 1995); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257 n.4 (3d Cir. 1992); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 n.4 (1st Cir. 1989).

The United States has failed to demonstrate, however, that Shell entered into that contract with B&B with the purpose of "arrang[ing] for disposal . . . of hazardous substances owned or possessed by" Shell.

According to the Ninth Circuit, Shell is liable under Section 107(a)(3) because it "arranged for the sale and transfer of chemicals under circumstances in which a known, inherent part of that transfer was the leakage, and so the disposal, of those chemicals." Pet. App. 50a. But arranger liability under CERCLA is confined to persons who entered into a contract, agreement, or other transaction with *the purpose* of "arrang[ing] for disposal . . . of hazardous substances." The Ninth Circuit did not find—and the United States does not contend that Shell sold its D-D to B&B for the purpose of "dumping," "spilling," or "leaking" that chemical. Rather, it is undisputed that Shell sold D-D to B&B—a company that specialized in agricultural chemical storage, sale, and application because the chemical is a useful commercial product that protects crop roots from worms. The fact that minor spills of D-D may have occurred when B&B transferred the chemical from a common carrier to its storage tanks does not transform this ordinary commercial transaction into an "arrange[ment]" between Shell and B&B "for disposal . . . of hazardous substances."

II. THE PLAIN LANGUAGE OF SECTION 107(a)(3) IS CONSISTENT WITH CERCLA'S STATUTORY OBJECTIVES.

"Given the clear meaning of the text, there is no need . . . to consult the purpose of CERCLA at all" in determining the scope of arranger liability under Section 107(a)(3). *Cooper Indus., Inc.*, 543 U.S. at 167. Nevertheless, the elements of arranger liability

established by the plain language of Section 107(a)(3) are fully consistent with CERCLA's animating purpose.

Congress enacted CERCLA in 1980 to respond to the significant environmental and public-health hazards posed by industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The four categories of "covered persons" in Section 107(a) were intended to ensure that "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions." *Id.* at 55-56 (quoting S. Rep. No. 96-848, at 13 (1980) (alteration in original)).

The common-sense prerequisites to "arranger" liability imposed by the plain language of Section 107(a)(3) promote Congress's objective of assessing the cost of hazardous waste remediation on those persons "actually responsible" for the release of that waste. Under Section 107(a)(3), a person is liable for cleanup costs where it entered into an arrangement with another person for the purpose of disposing of hazardous waste that is subsequently released into the environment. The arranger liability provision therefore prevents a generator of hazardous waste from escaping responsibility for cleanup costs simply by contracting with a third party for the disposal of that waste. Together with the "owner" and "operator" liability provisions of Sections 107(a)(1) and 107(a)(2), Section 107(a)(3) creates a comprehensive remedial framework that ensures that a generator is liable for cleanup costs whether the generator itself disposes of the waste on its own property or on the property of a third party or whether the generator contracts with another person for the disposal of the waste. *See supra* pg. 10 n.3.

There is no indication in the statutory language or legislative history, however, that Congress intended CERCLA a statute designed to address the "risks posed by *industrial pollution*" (*Best Foods*, 524 U.S. at 55 (emphasis added)) to apply to bona fide commercial transactions in useful goods. The costs of remediating hazardous waste are often staggering, and imposing those costs on parties who sell useful—but potentially hazardous products in arm's length transactions would require manufacturers to pass along their potential CERCLA liability to consumers through significant price increases. In light of the ubiquity of modern products that contain at least some potentially hazardous components, the economic repercussions of this liability regime would be profound.

Congress avoided this economically destabilizing result by restricting arranger liability to parties who "arrange" with another person for the purpose of "dispos[ing] . . . of hazardous substances" that are subsequently released into the environment. Well-settled principles of statutory construction counsel against disregarding these congressionally imposed prerequisites to arranger liability by extending CERCLA to parties whom the statute manifestly does not reach.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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